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Supreme Court U.S.
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No. 01-1695

IN THE
SUPREME COURT OF THE UNITED STATES

Maria Hsia,
Petitioner,

v.

United States of America.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

REPLY BRIEF

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In its Brief in Opposition, Respondent states that proof of knowledge of illegality is not necessary under the "willfulness" prong of 18 U.S.C. § 2(b) when an individual causes an intermediary to make a false statement to the Federal Election Commission. Respondent aligns the Second Circuit's opinion in *United States* v. *Gabriel*, 125 F.3d 89 (CA2 1997) with the District of Columbia Circuit's approach here, and states that the "practical difference" between these circuits and the Third Circuit's approach in *United States* v. *Curran*, 20 F.3d 560 (CA3 1994), is "relatively small."[1] Br. in Opp. 9.

Contrary to Respondent's assertions, the difference between specific and general intent is not relatively small. Compare *Ratzlaf* v. *United States*, 510 U.S. 135 (1994), with *Staples* v. *United States*, 511 U.S. 600 (1994). The Third Circuit requires the government prove beyond a reasonable doubt specific intent in a false statement case in the election law context, whereas the D.C. Circuit has been interpreted as requiring the government to prove none, because defendants can be convicted despite honest and reasonable mistakes of fact.

Moreover, the Second Circuit's decision in *Gabriel* does not parallel with the D.C. Circuit because it does not address false statements made in the context of a complex regulatory scheme. Respondent's argument that the *Gabriel* court was critical of *Curran* suggests that *Gabriel* did not follow *Curran* although it presented the same issues as the petition

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[1] Respondent also suggests that the Third Circuit might overrule *Curran* in light of the Second Circuit's alignment with *Hsia* in *Gabriel*. Br. in Opp. 14. It cites no authority for this statement, and in light of the differences outlined *infra* between *Curran* and *Gabriel*, this prediction is unfounded.

presents here.[2] This is disingenuous, and because this Court has held that knowledge of illegality is required in complex reporting requirement cases, the petition should be granted. *Ratzlaf*, 510 U.S. at 141-46 (1994); *Cheek* v. *United States*, 498 U.S. 192, 199-201 (1991).

1. The petition for certiorari presents two questions regarding the knowledge required for a conviction under §§ 1001 and 2(b) *in the election law context*. The first question is whether knowledge of illegality is required to prove mens rea under § 2(b) following *Ratzlaf* v. *United States*, 510 U.S. 135 (1994), and *United States* v. *Curran*, 20 F.3d 560, 569 (CA3 1994). The second question is whether knowledge of the facts that comprise the substantive offense is required under the "knowing and willful" language of § 1001.[3] *Bryan* v. *United States*, 524 U.S. 184, 192-93 (1998); *Curran*, 20 F.3d at 569.

a. The issue in *Hsia I* was how to define willfulness under § 2(b) in conjunction with the knowledge required by § 1001. The "intent" or "mens rea" question was whether to

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2 In addition to *Gabriel*, Respondent cites to a number of willfulness cases outside the federal election law context that are also inapposite. Br. in Opp. 10, citing *United States* v. *Daughtry*, 48 F.3d 829, 831 (CA4 1995), *vacated on other grounds*, 516 U.S. 984 (1995); *United States* v. *Yermian*, 468 U.S. 63 (1984); *United States* v. *Hopkins*, 916 F.2d 207 (CA5 1990).

3 Respondent formulates this question as a jury instruction challenge and states that it "does not merit certiorari review because it was neither pressed nor passed upon below." This argument ignores that the district court and both parties below believed that knowledge of the reporting requirements was not necessary based on the D.C. Circuit's rejection of *Curran*. Thus, Petitioner raises this issue in the context of *Hsia I*, which is a published opinion.

adopt *Curran*'s knowledge of illegality requirement, or apply a lesser mens rea requirement, *i.e.*, intent to cause statements to be made. The D.C. Circuit chose the lesser standard, defining the test for willfulness under § 2(b) as "the defendant [must] intentionally cause[ ] such statements to be made by another." *United States* v. *Hsia*, 176 F.3d 517, 522 (D.C. Cir. 1999) (*Hsia I*), citing *Gabriel*, 125 F.3d 89, 101 (CA2 1997).

The brief in opposition does not explain how the D.C. Circuit's definition is similar to *Curran* except to state that "in cases like this the government will ordinarily show[4] that the defendant had some knowledge of the law in order to show the defendant's knowledge of falsity." Br. in Opp. 13-14. This statement confuses knowledge of the law (willfulness under § 2(b)) with knowledge of falsity (*Hsia I*'s definition of the mens rea for the underlying offense—§ 1001). Thus, Respondent's argument is inapposite, because it cannot explain the square circuit split on the proper definition of willfulness in federal election law cases by relying on a different element of the offense.

b. Respondent next contends that §§ 1001 and 2(b) have "settled interpretations" that do not require knowledge of illegality, again suggesting that the Second Circuit's opinion in *Gabriel* is applicable. Br. in Opp. 13. But *Gabriel* does not conflict with *Curran*, nor does it reject the knowledge of illegality requirement in complicated regulatory scheme cases. *Id.* at 101-02, citing *Ratzlaf*, 510 U.S. at 141 (currency reporting violation), and *Cheek*, 498 U.S. at 200-01 (false statement violation in context of the tax laws).

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4 What the government will "ordinarily" show is not relevant; the issue is what it must prove.

Instead, *Gabriel* distinguishes *Curran*. Whereas *Curran* involves a complex regulatory scheme (the federal election laws), the regulatory scheme in *Gabriel* is "quite uncomplicated." *Gabriel*, 125 F.3d at 102. This case is more analogous to *Curran* because as the Second Circuit noted in *Gabriel*, the decision as to whether knowledge of illegality is required under § 2(b) turns on the context of the offense. *Gabriel* expressly states that it does not follow *Curran* because *Curran* applies specifically to "cases brought under sections 2(b) and 1001 in the federal election law context." *Id.* at 101. This Court naturally should follow *Curran*, as this is also a § 2(b) case in the federal election law context, and *Ratzlaf* and *Cheek* because this is a complex regulatory scheme case that requires knowledge of illegality under § 2(b).

2. *Gabriel* also supports Petitioner's second question, because even if knowledge of illegality is not required under § 2(b), more than knowledge of falsity is required to support the substantive offense (§ 1001). *Id.* at 101 n.9. Again, Respondent states that because the government will ordinarily have to show knowledge of the law to show that the defendant knew that the statement was false, this case does not warrant review. Br. in Opp. 13-14.

This assumption is misplaced because *Hsia I* can be interpreted, and was interpreted here, to mean that the defendant does not have to know the FEC's regulatory scheme so long as she knows that the names of the contributors are false.[5] But proof of knowledge of the

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[5] If this were true, a felony conviction under §§ 1001 and 2(b) would require less intent than a FECA conviction for causing contributions in the name of another. See 2 U.S.C. § 441f (requiring specific intent).

regulatory scheme, *i.e.*, that "true source" is required, in a complex regulatory case is the *only* way to show that Petitioner knows that a statement will be made to the FEC and that it will be false.

Respondent again relies on its premise that *ordinarily*, it will have to show that the defendant knew that the "listing of a particular person as the contributor means that the person was 'the true source of the money,' rather than 'the person in whose name money is given.'" Br. in Opp. 13. Because Respondent acknowledges that *Hsia I* can be misinterpreted, and because it was here, this petition warrants review. The error removed the issue of Petitioner's knowledge altogether from the jury's consideration. Thus, even though the government states that "ordinarily" it will have to prove that the defendant knew that true source was required, the jury was instructed that Petitioner's knowledge was irrelevant.

The district court did not require the government to prove knowledge of illegality *or* knowledge of "true source" reporting; thus, Petitioner was convicted on a strict liability theory in the election law context. Petitioner's jury was instructed that if she caused the false statements to be made, she was guilty whether or not she knew that her actions would result in such offense.

Further, whereas the Second Circuit in *Gabriel* could infer knowledge from the jury's finding of criminal intent, this Court cannot make the same inference because Petitioner's jury was told expressly to disregard whether she knew the FEC rules and regulations. *Gabriel*, 125 F.3d at

98-99. Nothing prevents other courts from interpreting *Hsia I* in this same manner.[6]

3. This petition warrants the Court's review to prevent future courts from interpreting *Hsia I* the way the district court did, as removing the defendant's knowledge entirely from the substantive offense.

Curran correctly follows this Court's analysis of "knowledge" in *Bryan* and "willfulness" in *Ratzlaf*. *Bryan*, 524 U.S. at 192-93; *Ratzlaf*, 510 U.S. at 149. Where the underlying statute requires knowledge and willfulness, "knowingly" refers to proof of the facts that comprise the underlying offense. *Bryan*, 524 U.S. at 192-93. "Willfully" requires either a culpable state of mind or knowledge of the law. *Id.*

Hsia I ignored *Bryan*'s requirement of knowledge.[7] This is true regardless of the proper definition of "willfully" in the election law context. Whether this Court decides that knowledge of illegality is required to satisfy the element of "willfulness" like *Curran*, or only requires intentional causation like *Hsia*, *Bryan* still requires proof that Petitioner knew that a false *statement* would be made (knowledge of the underlying offense). *Bryan*, 524 U.S. at 192-93.

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6 Although then Chief Judge Edwards exclaimed at oral argument that it looked like the government made this a strict liability offense, there is nothing in the published record to suggest that the government's or the district court's interpretation of *Hsia I* (or the case itself) is incorrect.

7 Or, a generous interpretation might be that *Hsia I* only addressed a defendant's knowledge of one of the elements—falsity. It ignored whether Petitioner knew that statements would be made.

That the government brought this case under § 2(b) because Petitioner did not make a false statement herself does not change the analysis. In this complex, First Amendment-regulated arena, the § 2(b) "causing" element is much more than just causing another to act; Petitioner had to know that she was causing reports to be false.[8] The underlying regulatory scheme that makes the reports false also requires a "knowing and willful" violation to impose a criminal penalty.[9] Pet. App. 169a-170a.

As the D.C. Circuit's opinion stands, only knowledge of falsity of the statements is required. *Hsia I*, 176 F.3d at 522. Respondent's statement that general knowledge of the FEC regulatory scheme is sufficient (Br. in Opp. 15) is nonsensical in this highly regulated, comprehensive, First Amendment-sensitive, statutory scheme. *Buckley* v. *Valeo*, 424 U.S. 1, 40-41 (1976) (noting that specificity and "'[p]recision of regulation'" is required where statutory limitations "impose[ ] criminal penalties in an area permeated by First Amendment interests).

Respondent argues that because the government had to prove that "a political committee treasurer made a false statement or representation to the Federal Election Commission" that this instruction satisfied the element of knowing "that federal election contributions were reported to the FEC." Br. in Opp. at 15 & n.3. As the petition states,

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8 Petitioner's indictment stated that she "knowingly and willfully caused the submission of a materially false statement to the FEC." J.A. 61-62, 64, 66, 68.

9 The March 2002 amendments to the federal election laws do not alter the "knowing and willful" intent requirement. Pub. L. No. 107-155, § 315(b), 116 Stat. 108 (March 27, 2002).

however, this argument is flawed because this instruction does not tell the jury that *Petitioner* has to know about the reporting requirements. Pet. App. 20-21. Instead, it starts from the premise that a statement is made, and instructs that if that statement is false, the defendant caused it. The confusion obviously stems from *Hsia I*'s "willfulness" analysis; thus, the petition requires review.

CONCLUSION

For the foregoing reasons, and for those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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